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In the Supreme Court of the United States.

OCTOBER TERM, 1905.

ILLINOIS CENTRAL RAILROAD COMPANY, PLAINTIFF in error,
v.
J. U. McKENDREE.

IN ERROR TO THE CIRCUIT COURT OF CARLISLE COUNTY, STATE OF KENTUCKY.

SUGGESTION OF THE WANT OF JURISDICTION AND BRIEF THEREON.

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The court directed restoration of this cause to the docket and that notice be given to the Attorney-General. Having obtained permission, he now comes and respectfully suggests that the writ should be dismissed because not within the jurisdiction of the court.

BRIEF IN SUPPORT OF SUGGESTION.

STATEMENT.

In the Circuit Court of Carlisle County, Ky., the highest of the State in which a decision could be had, McKendree sued the railroad company to recover $80 damages resulting from the death of his cows, which was caused by its alleged wrongful action.

The original petition alleged (R., 1):

> * * * that on the 11th day of July, 1903, they (the railroad company) received for transportation one car or more of infected cattle, and transported them into the town of Arlington. And on the 13th day of July, 1903, unloaded said infected cattle in said town, placing them in stock pens in said town where cattle running on the commons, where they had a right to run, could and did come in contact with said infected cattle and contracted infection, Texas cow fever, and that the defendant knew or could have known with reasonable care that said cattle did have infectious germs when they unloaded said infected cattle, they having brought them from an infected district, knowing and in open conflict with well-known quarantine laws; and while said infected cattle was so held by defendant in said stock pens, the defendant's cows came in contact with said infected cattle and contracted said Texas cow fever and died.

The defendant interposed a general demurrer, claiming the facts stated were insufficient to constitute a cause of action. This was overruled (R., 2). Thereupon it answered and denied (R., 3)—

> that it brought the car load of cattle complained on from any infected district, knowing or otherwise, or that it so brought them against or in conflict with any quarantine laws, and it denies that said cattle was infected, and it denies that it knew or could have known

with the use of reasonable care, at any time, that any of said cattle had infectious germs; it has no knowledge or information sufficient to form a belief as to whether either of plaintiff's cows contracted the disease from which they died from any of said cattle, or as to whether they were worth $80 or any more than $30. And it denies that by any act of it it has damaged plaintiff in the sum of $80 or part of it.

On a later day the railroad company filed an amended answer setting up the following:

Further answering herein, the defendant says that the claims of the plaintiff herein asserted are based upon a certain alleged act of Congress of the United States of America approved February 2, 1903, entitled "An act to enable the Secretary of Agriculture to more effectually suppress and prevent spread of contagious and infectious diseases of live stock, and for other purposes," which act is published and contained in volume 32, United States Statutes at Large, beginning at page 791, and also in a supplement to the United States compiled statutes issued in 1903, by the West Publishing Company, St. Paul, Minn., beginning at page 372 of said volume, and said claims are further based upon certain alleged regulations adopted and promulgated by the Secretary of Agriculture on March 13, 1903, pursuant to the authority attempted to be conferred upon him by said alleged act of Congress above mentioned, approved February 2, 1903.

The defendant says that said act of Congress hereinbefore mentioned and said regulations

> adopted by the Secretary of Agriculture as hereinbefore stated are each and all of them repugnant to and in contravention of the Constitution of the United States of America, and is in excess of the powers of Congress and of the Secretary of Agriculture under the Constitution of the United States, and they are each and all, therefore, unconstitutional and void, and under the Constitution of the United States this defendant has the right, privilege, and immunity of being exempt from the assertion or prosecution of any claims against it based upon or arising under such act of Congress or said regulations or any of them, and this defendant, as permitted by section 709 of the Revised Statutes of the United States, hereby specially sets up and claims and pleads in defense of this action the right and privilege and immunity which is secured to it by the Constitution of the United States to be exempt from all suits and prosecutions and all claims against it based upon or arising under such unconstitutional and void act of Congress and regulations adopted or promulgated by the Secretary of Agriculture.

To the amended answer plaintiff demurred generally (R., 4), and thereafter by agreement he filed an amended petition, the affirmative allegations of which were controverted of record. (R., 4, 5.)

The amended petition said (R., 5–6):

> The defendant, Illinois Central Railroad Company, on the 13th day of June, 1903, received one car of cattle at Grand Junction, Tenn., to be transported to the town of Arlington, Ky.,

and on the 13th day of said month unloaded them in the stock pens in said town.

That the town of Arlington is a small town located on defendant's road in this, Carlisle County, and defendant's stock pens are located adjacent to the public highway and commons, and that Grand Junction, Tenn., is located on defendant's road and south of the quarantine line that was established on the 14th day of March, 1903, by and under the existing quarantine laws, and that said quarantine line, beginning on the Mississippi River, etc. [describing the course of the same through Tennessee], * * * And that the defendants received said cattle south of said quarantine line and transported them north and out of a quarantine district and south of the said quarantine line and transported them north through the State of Tennessee, into this county and State, and unloaded them in the town of Arlington and placed them in their stock pens adjacent to the public highway and commons, where plaintiff's cows came in contact with the germ of Texas cow fever that said cattle had on them when put in the pens as aforesaid; that said stock pens were suffered and permitted to remain open and exposed to cattle after the removal of said cattle without disinfecting, or any other effort to protect exposed stock, and plaintiff's cows contracted Texas cow fever from said germs produced from said cattle while in said stock pens, to the damage of plaintiff.

The demurrer to the amended answer was sustained; the cause was tried to a jury and verdict

rendered for $65, upon which judgment was entered. (R., 6, 7.)

The court refused to direct verdict for defendant, but did, upon its request, instruct the jury:

> That they can not find for plaintiff unless the cattle shipped by J. A. Jones over defendant's railroad and unloaded at Arlington had Texas fever or Texas ticks; nor can the jury find for plaintiff, although they may believe said Jones's cattle were infected by Texas fever or Texas ticks, unless they further believe that plaintiff's cattle contracted the disease from said Jones's cattle while the latter were in the pens of defendants at Arlington. (R., 8–9.)

Upon its own motion the court instructed that if the cattle shipped by defendant were infected with Texas fever, and if by reason of that disease plaintiff's cows were infected and died, he was entitled to recover their reasonable value; and further, that unless plaintiff's cows caught an infectious disease from the cattle shipped over defendant's road and died therefrom, it was entitled to a verdict notwithstanding the cattle in fact had Texas fever. (R., 9.)

The bill of exceptions (R., 24) shows the court permitted plaintiff, over objection, to introduce in evidence regulations to prevent the spread of splenetic fever among cattle, promulgated by the Department of Agriculture (Order No. 107). The reasons upon which objection was based do not appear.

The railroad company unsuccessfully asked a new trial. It maintained that the verdict was not sup-

ported by the evidence; that the court erred in sustaining the demurrer to the amended answer; that copy of the orders of quarantine issued by the Secretary of Agriculture was wrongfully admitted in evidence, "the defendant contending that the same was not properly or legally proven;" that certain evidence concerning Brown's premises was improperly allowed; that the instructions upon the court's own motion constituted error; and that a verdict for the defendant should have been directed. (R., 7, 8.)

The presiding judge certified (R., 10) that at the trial the railroad company relied and insisted upon certain rights, privileges, and immunities specially claimed by it under the Constitution of the United States, claiming and contending that the various orders promulgated by the Secretary of Agriculture were unconstitutional, null, and void, being in excess of the powers conferred, or which could be conferred, by Congress upon him; and that the act of Congress under which the Secretary assumed to promulgate such orders was unconstitutional, being in conflict with the Constitution of the United States and in excess of the powers conferred upon Congress. That the defendant contended that no right of action against it accrued by reason of such regulations or by reason of its failure to comply with the same on the ground that Congress did not attempt to give a remedy by way of a civil action for their breach; and, moreover, that the defendant specially set up and claimed if the act of Congress and the regulations were valid it had a right, privilege, and immunity

under the said act of Congress or said regulations and orders from any liability to the plaintiff in a civil action for damages occasioned by breach of the same. And that by allowing the regulations to be given in evidence and in overruling the defendant's motion for peremptory instructions the court disallowed the various contentions made in behalf of the defendant and denied the claims made by it of the rights, privileges, and immunities specially claimed, as above stated, and rendered a judgment in plaintiff's favor solely by reason of the alleged breach of said regulations and orders.

A writ of error was allowed to this court (R., 17) and six errors have been assigned (R., 12–15).

The first assignment questions the court's action in permitting introduction of the regulations of the Secretary of Agriculture.

The second questions its ruling in sustaining the demurrer to the amended answer.

The third maintains that under the act of February 2, 1903, the Secretary of Agriculture had no authority to adopt or promulgate the regulations specified, and that in holding the contrary the court denied the defendant a privilege and immunity and exemption from liability or proceeding of any character under such orders.

The fourth asserts that Congress had no power to confer upon the Secretary of Agriculture authority to adopt, promulgate, or enforce the orders and regulations specified, and that holding the contrary the

court denied the railroad's claim to a privilege, immunity, and exemption under the Constitution from liability or proceeding under any of the orders, rules, and regulations aforesaid.

The fifth sets up that the court erred in holding defendant liable by reason of alleged violation of the orders of the Secretary of Agriculture and in so doing denied its claim of exemption.

The sixth specifies as error the action of the court in rendering judgment against defendant because of its failure to comply with the regulations of the Secretary of Agriculture.

The Revised Statutes define the appellate jurisdiction of this court over State courts as follows:

> SEC. 709. A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such

Constitution, treaty, statute, commission, or authority, may be reexamined and reversed or affirmed in the Supreme Court upon a writ of error. * * *

ARGUMENT.

The only Federal questions specifically raised and passed upon during the trial of the cause below were the two in the amended answer (R., 3):

First. The act of Congress approved February 2, 1903, entitled "An act to enable the Secretary of Agriculture to more effectually suppress and prevent the spread of contagious and infectious diseases of live stock, and for other purposes" (32 Stat., 791), is in conflict with the Constitution of the United States and therefore void.

Second. The regulations adopted and promulgated by the Secretary of Agriculture on March 13, 1903 (R., 25), were also in conflict with the Constitution and void.

There is nothing in the pleadings or the certificate of the judge to show what constitutional provisions were relied upon to support the railroad's contentions.

The State court sustained the validity of both the act of Congress and the regulations of the Secretary. Section 709, Revised Statutes, does not, therefore, authorize this court to review the decision.

The railroad company in its amended answer attempted to lay ground for a review under section 709 by saying that it was entitled under the Con-

stitution to the right, privilege, and immunity of being exempt from suits and prosecutions and all claims based upon or arising under an unconstitutional or void act of Congress or regulations promulgated by an executive officer. No provision of the Constitution or laws specifically granting such privilege or immunity is pointed out, and manifestly the contention is but another way of stating that an unconstitutional enactment or regulation is without effect.

The evident purpose of Congress expressed in section 709, Revised Statutes, was not to permit this court to review the action of a State court which sustained the validity of a statute or regulation; but the contention of the railroad company would give jurisdiction wherever the constitutionality of an act was called in question, irrespective of what was decided. If the State court should hold a statute relied upon by plaintiff constitutional, then, according to the contention here put forth, the defendant would have the right to bring the cause to this court; and if the statute should be held bad, plaintiff, having relied upon it, would be entitled to bring up the cause.

In the brief for the railroad company attention is directed to section 5258, Revised Statutes, which provides:

> Every railroad company in the United States whose road is operated by steam, its successors and assigns, is hereby authorized to carry upon and over its road, boats, bridges, and

ferries, all passengers, troops, Government supplies, mails, freight, and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination.

This statute was not relied on in the court below during the progress of the cause. It need not, therefore, be further noticed.

To give this court jurisdiction the Federal question must have been distinctly raised and passed upon by the State court. It can not originate in the certificate, assignments of error, or brief.

Allen v. *Arguimbau*, 198 U. S., 149.
Oxley Stave Co. v. *Butler County*, 166 U. S., 648.
Sayward v. *Denny*, 158 U. S., 180.
Powell v. *Brunswick County*, 150 U. S., 433.
Manning v. *French*, 133 U. S., 186.
Felix v. *Scharnweber*, 125 U. S., 54.
Railroad Co. v. *Rock*, 4 Wall., 177.
Maxwell v. *Newbold*, 18 How., 511.

Where the State court sustains the validity of an act or authority called in question its judgment can not be reviewed by this court.

McNulta v. *Lochridge*, 141 U. S., 327.
Jersey City and Bergen Rd. v. *Morgan*, 160 U. S., 288.
Baker v. *Baldwin*, 187 U. S., 61.

In *Missouri* v. *Andriano* (138 U. S., 496, 499, 500), this court said—

> The object of the present judiciary act was not to give a right to review wherever the validity of an act of Congress was drawn in question, but to prevent the courts of the several States from impairing or frittering away the authority of the Federal Government, by giving a construction to its statutes adverse to such authority. Of course, if the construction given by the State court to the act under which the right is claimed be favorable to such right, no such reason exists for a review by this court. As stated by Chief Justice Taney in the *Commonwealth Bank* v. *Griffith* (14 Peter, 56, 58), "the power given to the Supreme Court by this act of Congress was intended to protect the General Government in the free and uninterrupted exercise of the powers conferred on it by the Constitution, and to prevent any serious impediment from being thrown in its way while acting within the sphere of its legitimate authority. The right was therefore given to this court to reexamine the judgments of the State courts where the relative powers of the General and State government had been in controversy, and the decision had been in favor of the latter."

When review of the judgment of a State court is sought, the right, privilege, or immunity claimed under the Constitution must have been indicated specifically by appropriate language, or by necessary intendment, making it clear that a certain definite provision was relied on.

Maxwell v. *Newbold*, 18 How., 511, 516, 517.
Sayward v. *Denny*, 158 U. S., 180, 184.
Clarke v. *McDade*, 165 U. S., 168, 172.
Marvin v. *Trout*, 199 U. S., 212–224.

I respectfully submit that the writ of error should be dismissed.

WM. H. MOODY,
Attorney-General.

J. C. MCREYNOLDS,
Assistant Attorney-General.

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